IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ARBITRATION CASE NO.162 OF 2006(O&M)

DATE OF DECISION: JULY 25, 2007

NATHA SINGH

.....PETITIONER
through Mr.P.S.Rana,
Advocate.

Versus

UNION OF INDIA

.....RESPONDENT
through Mr. Puneet Jindal,
Advocate.

CORAM: HON'BLE MR. JUSTICE VIJENDER JAIN, CHIEF JUSTICE

1. **Whether Reporters of Local Newspapers may be allowed to see the judgment?**

2. **To be referred to the Reporters or not?**

3. **Whether the judgment should be reported in the Digest?**

VIJENDER JAIN, CHIEF JUSTICE (ORAL)

This petition has been filed by the petitioner *inter-alia* under Section11(6) of the Arbitration and Conciliation Act for appointment of the Arbitrator. This petition was filed initially before the Civil Judge (Senior Division), Amritsar on 04.01.2002. Respondent filed the reply and took the plea that the matter of appointment of Arbitrator is under consideration of the respondent. Thereafter, the petition was transferred to this Court on 11th May, 2006. Now the respondent has filed an application *inter-alia* stating that in terms of the Arbitration Clause, the respondent had forwarded the names of four persons who could be appointed as Arbitrator vide letter dated 09.11.2006. The date of the agreement is 27.09.1994. Clause- 64 of the agreement is a matter on which reliance has been placed by learned counsel for the respondent and the same is reproduced below:-

"Demand for Arbitration -(1) (i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties in any matter in question, dispute or difference on any account, or as to the withholding by the railway of any certificate to which the contractor claim to be entitled to, or if the railways fails to make a decision within a reasonable time, then and in any such case, save the "excepted matters" referred to in clause 63 in these conditions, the contractor, after 90 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration.

(ii) the demand for arbitration shall specify the mater which are in question, dispute or difference. Only such dispute(s) or difference(s) in respect of which the demand has been made, shall be referred arbitration and other matters shall not be included in the reference.

(iii) If the contractor(s) does/do not prefer his/their specific and final claims in writing within a period of 90 days of receiving the intimation from the Government that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the railway shall be discharged and released of all liabilities under the contract in respect of these claims.

(2) Obligation during pendency of arbitration – Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the railway shall be withheld on account of such proceedings provided, however, it shall be open for arbitrator or arbitrators to consider and decide whether or not such work should continue during arbitration proceedings.

(3) Arbitration – (a) (i) A sole arbitrator who shall be the General Manager or a Gazetted Railway Officer nominated by him in that behalf in case where the claim in question is below Rs.5,00,000 (Rupees five lakhs) and in cases where the issued are not a complicated nature, the General Manager shall be the Sole judge to decide whether or not the issues involved are of a complicated nature.

(3) (a) *(ii)* Two Arbitrators who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid in Clause 64(3)(b) for all claims of Rs.5,00,000 (Rupees five lakhs) and above, and for all claims irrespective of the amount of value of such claims if the issues involved are of the complicated nature. The General Manager shall be the sole judge to decide whether the issues involved are of a complicated nature or not. In the event of the two arbitrators being divided in their opinions, the matter under disputes will

be referred to an umpire to be appointed in the manner laid down in Clause 3(b) for his decision.

(3) (a) (*iii*) It is a turn of this contract that no persons other than a Gazetted Railway Officer should act as an Arbitrator/Umpire and if for any reason, that is not possible, the matter is not to be referred to arbitration at all."

It has been contended before me that sub-section 4 and sub-section 5 (2) of Section 11 of the Arbitration and Conciliation Act provide a period of thirty days to appoint an Arbitrator, in case the party fails to appoint an arbitrator within 30 days from receipt of a request by one party, the aggrieved party may request the Chief Justice or any person or Institution designated by him for securing the appointment under sub-section 6 of Section-11, but under that sub-section no period of limitation is prescribed, therefore, there is no obligation on the part of the respondent to supply the vacancy within 3o days. Another argument which was raised by counsel for the respondent was that non-supply of vacancy in the absence of any period prescribed under Section 11(6) would not constitute failure on the part of the respondent to supply the vacancy, therefore, the Chief Justice will not be in a position to supply the vacancy in the absence of any stipulation given under the statute fixing a time limit for the opposite party to supply a vacancy of an Arbitrator. Another point raised by the counsel for the respondent was that in case this Court comes to a conclusion that the respondent has foregone its right to supply the vacancy then also in view of sub-section 8 of Section 11, this Court will have to appoint the person as Arbitrator with the qualification prescribed under the agreement.

Learned counsel for the petitioner has vehemently contended that the submission of the learned counsel for the respondent is contrary to the law laid down by the Supreme Court as well as other High Courts and this Court. Reliance has been placed on the decision of **Datar Switchgears Limited vs. Tata Finance Ltd 2000(8) SCC 151.** Reliance has also been placed on the decision of **Shankar Traders vs. Union of India and Others 2007(1) Arb.LR 10,** which dealt with the contract with the Railways and having a similar clauses. Though, in Shanker Traders case (supra), the question of appointment of named person in the agreement has not been specifically dealt, but a Division Bench of Delhi High Court in the case of **Delkon(India) Pvt. Ltd. vs. The General Manager, Bharat Heavy Electricals Ltd., 2005(2)Arb.LR 272 (Delhi)** held that:-

> **"4.** We have given our careful consideration to the arguments advanced by learned counsels for both the parties. In view of the law laid down in the case of **Datar Switchgears Ltd. vs. Tata Finance Ltd. And another,** JT 2000 (Suppl.2) SC 226=2000(3) Arb. LR 447 (SC), it is no more res integra that the vacancy can be supplied by a party pursuant to the arbitration agreement even after thirty days of the receipt of the notice. However, once a party approaches the Court and files a petition for appointment by the designated authority of the Chief Justice of that Court under Section 11(6) of the Arbitration and Conciliation Act, the right to supply vacancy by the opposite party is extinguished."

In the arbitration clause, it is provided that in the event of any dispute or difference between the parties hereto as to the construction or

operation of this contract, or the respective rights and liabilities of the parties in any matter in question, dispute or difference on any account, or as to the withholding by the railway of any certificate to which the contractor claim to be entitled to, or if the railways fails to make a decision within a reasonable time, then and in any such case, save the "excepted matters" referred to in clause 63 in these conditions, the contractor, after 90 days but within 180 days of his presenting his final claim on disputed matters, shall demand in writing that the dispute or difference be referred to arbitration. If the interpretation advanced by the respondent with regard to limitation as given above is accepted then invocation of arbitration clause shall have no meaning and that appointment of Arbitrator can be frustrated by any opposite party by taking a plea that no period has been prescribed under sub-section 6 of Section 11 of the Act and there is no obligation on the part of the said party to appoint an Arbitrator. Confronted with such a situation, the Division Bench of the Delhi High Court in Delkon (India) Pvt. Ltd .case (supra) relying upon the judgment of Supreme Court in Datar's case(supra), to which reference has been made above, took a view that in the absence of any period prescribed in sub-section 6 of Section 11 of the Arbitration and Conciliation Act, the right of the opposite party comes to an end to supply the vacancy when the petition for appointment of Arbitrator by other party under Section 11 is presented before the Chief Justice or his nominee. Therefore, there is no force in the arguments of the counsel for the respondent, that the respondent could take any time to supply the vacancy. Coming to the second limb of the arguments of the respondent with regard to supply of vacancy, in terms of the provisions of sub-section 8 of Section 11 of the Arbitration and Conciliation Act, the respondent have forfeited its right to supply vacancy, because the arbitration clause was invoked on 12.06.2001 but the vacancy was not supplied and the petitioner filed the petition under Section 11 of the

Arbitration Act on 04.01.2002. It is no more res-integra that if the vacancy is not supplied before the filing of a petition, the right to supply the vacancy by the opposite party is extinguished. What is the effect of sub-section 8 of Section 11 of the Act?, for that let us go to the clause of the arbitration on which a reliance has been placed by counsel for the respondent. 64(3)(a)(iii) is a clause , which does not specify any qualification. The only qualification is that he has to be a gazetted Railway Officer. Legislature in his wisdom has laid an embargo in sub-section 8 of Section 11 to safeguard that right where under an agreement, there is a complicated dispute relating to technical evaluation requiring high degree of Engineering and in sophisticated skills, then in such cases, the Court would not substitute an Arbitrator who are not having expertise. However, under the Act, there is no fatter on the power of the Chief Justice to exercise its discretion on the long standing principle of exercise of power based on discretion, in appointing an Arbitrator to resolve the disputes between the parties.

Therefore, this ground of attack of the counsel for the respondent also fail. The respondent was only interested in having their own officers as Arbitrator without specifying any qualification for him and, therefore, clause sub-section 8 of Section 11, as a matter of fact, will not come to the aid of the respondent. The authority cited by the petitioner in the case of Shankar Traders(supra) deals with all aspects of the appointment matter and the arbitration clause which was before the Court and is similar in terms which is before me. Therefore, I hold that respondent having lost the right to supply the vacancy cannot insist on supplying the vacancy of an Arbitrator in terms of arbitration clause pertaining to their officers.

Therefore, I appoint Justice N.C.Jain, (retired Chief Justice of Guwhati High Court) as a sole Arbitrator to decide the dispute between the

parties. The Arbitrator shall fix his own fee. The fee will be shared between the parties. Parties to appear before the Arbitrator on 01.09.2007 at 4.00 PM.

The petition stands disposed of.

July 25, 2007 **(VIJENDER JAIN)**
nt **CHIEF JUSTICE**